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# WE NEED TO TALK ABOUT POLICE DISCIPLINARY RECORDS

*Kate Levine*[*]

In March 2017, an employee of New York's Civilian Complaint Review Board leaked the disciplinary record of Daniel Pantaleo to the media.[1] Pantaleo, the police officer who choked Eric Garner to death in the video[2] that went public and horrified many citizens, is under federal investigation[3] after a Staten Island grand jury refused to indict him for Garner's death.[4] Legal Aid Society attorneys had unsuccessfully sought the release of his records in the courts for years.[5] The leak of his records is the public face of an important but rarely discussed issue facing police, legislators, judges, lawyers, and scholars who care both about transparency for public servants and privacy for individual citizens: how and when police should be forced to make their disciplinary records public.

Issues surrounding police accountability are at the heart of both criminal and racial justice reform. Very public debates are taking place about community policing, body cameras, prosecutions of individual officers, and race-based policing.[6] Amidst these debates an equally important but quieter battle is being waged between the privacy of police officers and the transparency owed to the public.

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[1] Jack Jenkins & Carimah Townes, *Exclusive Documents: The Disturbing Secret History of the Officer who Killed Eric Garner*, THINK PROGRESS, Mar. 21, 2017, https://thinkprogress.org/daniel-pantaleo-records-75833e6168f3#.rrhh7jycp.

[2] Video available at https://www.theguardian.com/us-news/video/2014/dec/04/i-cant-breathe-eric-garner-chokehold-death-video.

[3] *See e.g.*, Rocco Parascondola, *Two Cops Testify in Eric Garner Case at Brooklyn Federal Court*, DAILY NEWS, Mar. 24, 2017, http://www.nydailynews.com/new-york/brooklyn/cops-testify-eric-garner-case-brooklyn-federal-court-article-1.3007384.

[4] J. David Goodman & Al Baker, *Waves of Protests After Grand Jury Doesn't Indict Officer In Eric Garner Chokehold Case*, N.Y. TIMES, Dec. 2, 2014, at A1.

[5] *See, e.g.*, Eugene Volokh, *N.Y. Appellate Court Refuses to Order Release of Eric Garner Grand Jury Materials*, WASH. POST, July 29, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/29/n-y-appellate-court-refuses-to-order-release-of-eric-garner-grand-jury-materials/.

[6] The sources for these debates are far too numerous for a short essay, but scholars have written extensively on each topic. *See, e.g.*, Tracey L. Meares, *Praying for Community Policing*, 90 Cal. L. Rev. 1593, 1628 (2002) (community policing); Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 Wash. U. L. Rev. 831, 836-37 (2015) (body cameras); Kate Levine, *Police Suspects,* 116 Colum. L. Rev. 1197 (2016) (prosecutions of police); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?,* 51 Harv. C.R.-C.L. L. Rev. 159 (2016) (race-based policing).

In New York, this battle is over a little-discussed statute that protects the disciplinary records, and potentially other sources of information, of individual police officers.[7] The statute, New York Civil Rights Law section 50a (hereinafter section 50-a), is at the heart of whether Daniel Pantaleo's disciplinary record should be a matter of public record or remain private, given the backdrop of privacy concerns relating to the records of many government and all private employees.[8]

Beyond questions about Pantaleo's record is a broader movement to repeal section 50-a, which scholars and civil rights lawyers contend is a barrier to police accountability, but police groups insist is an important protection for the privacy and safety of individual officers. As can be said for many arguments surrounding policing, this debate pits central legal and theoretical principles against one another. On the one hand is the importance of accountability and transparency to ensuring the working of our democratic system: The police should be accountable to the public they serve, and many believe that there cannot be accountability without transparency. On the other hand, there is the profound and ever-growing issue of privacy and control over one's personal and professional information in a world where we are increasingly surveilled, exposed, and outed *by* government, social media, and corporate data entities.[9]

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[7] There is very little academic writing on the subject, with two notable exceptions. Cynthia Conti Cook, an advocate and Legal Aid attorney, has both testified in favor of New York Civil Rights Law section 50's repeal and written about the problems with the law in an academic publication. *See* Cynthia H. Conti-Cook, *Defending the Public: Police Accountability in the Courtroom*, 46 Seton Hall L. Rev. 1063, 1075 (2016); Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 Stan. L. Rev. 743, 776 (2015) (reviewing all 50 states' practices with regard to police misconduct and *Brady* obligations and arguing that police disciplinary records should be routinely made available to criminal defendants).

[8] There are far too many privacy-related statutes to mention here but two examples should serve. New York Civil Rights Law section 50 protects not just police records, but also the records of firefighters, paramedics, and probation officers. Additionally, all federal employees' records are jealously guarded by federal statute. Under 5 C.F.R. Part 293.311, other than basic identifying information, no federal employee's information is released to any party without a summons, warrant, or subpoena.

[9] *See, e.g.*, Bernard E. Harcourt, EXPOSED: Desire and Disobedience in the Digital Age, (Harv. U. Press, 2015) (discussing the ways in which modern behavior exposes us to surveillance); Scott Skinner-Thompson, *Outing Privacy*, 110 Nw. U. L. Rev. 159, 161 (2015) (arguing that there are constitutional limitations on the ability of the government to out or disclose intimate information).

In this essay, I argue that the release of police disciplinary records requires balancing privacy and transparency values, which differ depending on when and to whom such records are released. Implicit in this categorization is the belief that there is value in keeping certain information about police officers, even information that pertains to their official functions, private. I will focus on section 50-a, although all states have some version of this law. In Part I, I argue that the stated purpose of the law, to prevent defense attorneys from accessing police disciplinary records during a criminal trial, is the *least* compelling justification for police privacy. In Part II, I will then argue that outside of the courtroom, the release of police records is a much closer question, one that pits privacy against transparency, not just for police officers, but also for many thousands of other government employees. Finally, in Part III, I briefly gesture to the way the debate over police privacy dovetails with another criminal justice issue: the privacy rights of formerly incarcerated individuals.

## I. Police Records in the Courtroom

Section 50-a protects police and certain other public employees from the disclosure of their employment records. Although every state has some variation of this law, New York's statute is known to be among the most protective of officer privacy.[10] It states that:

> All personnel records used to evaluate continued employment or promotion, under the control of any police agency . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order.[11]

As is clear from the quoted portion of the statute above, the default is privacy, not only in cases like Pantaleo's, where the request is to make the record open to the entire public, but also when the request is from a criminal defendant in a trial where the officer's credibility is central to the case. In fact, the lobbying surrounding the law's passage, reflected in the stated legislative intent of the law, was to stop defense attorneys

[10] COMM. ON OPEN GOV'T, STATE OF N.Y. DEP'T OF STATE, ANNUAL REPORT TO THE GOVERNOR AND STATE LEGISLATURE 3-5 (Dec. 2014), http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf (New York's statute is among the most protective of police records).

[11] N.Y. CIV. RIGHTS LAW § 50-a (McKinney 2016).

from accessing the files of officers who would testify against their clients.[12]

In numerous cases, New York courts have noted that the very purpose of the law is to stop defense attorneys from going on a "fishing expedition" into the record of an officer who has arrested or otherwise participated in the case against her client.[13] Thus, the law insists that the accused have a "good faith . . . factual predicate" that the record contains "information, which, if known to the trier of fact, could very well affect the outcome of the trial."[14] The irony of this standard is immediately apparent: a defendant must have knowledge that an officer's disciplinary record will contain matters relevant to her case *before* getting a chance to review the file. How can she know whether such material – kept secret from her, the judge in the case, and at times even the prosecutor – will contain relevant information? Yet this is the hurdle she must overcome to be allowed to examine a police personnel record. Moreover, the New York Police Department routinely opposes requests for such information, even opposing in camera review by a judge deciding the motion.[15]

Judges, who could under the law review such records in camera as a routine, instead rely on prosecutors to disclose such material if they know and believe it to be material under their *Brady* obligation.[16] While prosecutors have access to police records,[17] there is no requirement that they examine such records, nor is scrutiny of records routinized by district attorneys' offices.[18] The *Brady* right has been criticized by many as too narrowly tailored, too favorable to prosecutors, and too easily eschewed by a prosecutor who wants to keep information from the defense or who through intentional or unintentional ignorance fails to discover exculpatory material to turn over to a defendant. As David

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[12] *See* People v. Gissendanner, 48 N.Y.2d 543, 548 (1979) (discussing legislative intent of law).

[13] *See, e.g.*, Dunnigan v. Waverly Police Dep't, 279 A.D.2d 833, 834 (App. Div. 3, 2001) ("[The statute] is designed to eliminate fishing expeditions into police officers' personnel files for collateral materials to be used for impeachment purposes . . . ."); Zarn v. City of N.Y., 198 A.D.2d 220, 220–21 (App. Div. 2, 1993) (same); Capital Newspapers Div. of Hearst Corp. v. Burns, 109 A.D.2d 92, 95 (App. Div. 3, 1985), aff'd, 496 N.E.2d 665 (1986) (same).

[14] Gissendanner, 48 N.Y.2d 543 at 548.

[15] *See* Conti-Cook, *supra* note 7 at 1075 (noting that the law allows for in camera review but that this review is often opposed by the police department).

[16] *Id.*

[17] *See* Abel, *supra* note 7 at Part II (analyzing different states' rules on prosecutors' access to police files).

[18] *Id.* at 30 (discussing an interview with a District Attorney in New York, who admitted she had no formal system for learning impeachment evidence nor any plan to implement one).

Sklansky, a former federal prosecutor, puts it, the *Brady* standard should be a minimum for prosecutors deciding what information to turn over to a defendant in a criminal case because it often fails to encompass all of the relevant evidence that should be disclosed.[19] Moreover, as I have noted in past articles, prosecutors have every incentive to avoid knowledge of police officer misconduct. First, such misconduct might hurt her odds of a conviction in an individual criminal case. Second, close scrutiny of an officer's record might negatively impact not only a prosecutor's all important relationship with that officer but also her relationship with other officers she will repeatedly need to work with in future cases.[20]

Despite the image that the term "fishing expedition" portrays, it is hard to imagine a less compelling privacy concern than that of a testifying officer in a criminal case. First, numerous important constitutional rights weigh in favor of open access for criminal defendants. These include the right to confront witnesses[21] and the right to obtain any evidence that might be exculpatory.[22] And unlike prosecutors and judges, defense attorneys are the only actors in a criminal contest who will scrutinize an officer's disciplinary record with their clients' interest in mind.

As many scholars have noted, a criminal case is often a contest between police and defendant credibility.[23] There are myriad cases when the police officer is the only witness to the alleged crime and the only source of information as to the officer's own actions regarding a suspect – a person accused of trespassing late at night or burgling an empty store, for example. Indeed, many drug cases are "buy and busts" in which police officers pose as drug buyers in order to arrest someone selling illegal narcotics, meaning that the officer and the defendant are the only witnesses. Even in cases where there is evidence other than police testimony, police credibility may be all that stands between a defendant and conviction. Evidence may only be introduced against a defendant at a trial if it was seized during a legal search or after a legal arrest. At a hearing to challenge the introduction of such evidence, the only

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[19] David Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. Davis L. Rev. Online 25, 33-36 (2017).

[20] *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 Iowa L. Rev. 1447, 1465-70

[21] U.S. Const. Amend. VI ("[I]n all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him.").

[22] *Brady v. Maryland*, 373 U.S. 83 (1963) (due process requires prosecutors to turn over discoverable exculpatory material).

[23] *See, e.g.,* Paul Butler, LET'S GET FREE: A HIP HOP THEORY OF JUSTICE (The New Press 2009) 102 ("One of your primary functions as a prosecutor is to make the judge and jury believe the police.").

witnesses will often be the officers who conducted the search and arrest and the defendant.

At such a suppression hearing, the defense must argue that the police seized evidence or performed an arrest in violation of the law when the police themselves claim that the arrest or evidence seizure was performed legally. This would be a tall order even with an ordinary witness – the defense must find a way to prove to the judge that the sworn witness is lying or is not credible. Now, imagine the testimony is offered by a police officer, a repeat player in the system, with the implicit and explicit credibility that his office entails, combined with the institutional and systemic bias in favor of his credibility.[24] On the other side is an accused defendant, often with a criminal history, who is facing prison if the evidence is admitted or the arrest is allowed. It is not hard to imagine which story a judge will be inclined to believe, particularly when the entire case against the defendant may rise or fall on the outcome of the suppression hearing. Not surprisingly, defendants rarely win at suppression hearings,[25] despite reams of evidence that police routinely violate defendants' rights.[26]

In these instances, then, it is critical that a defense attorney have access to the testifying officer's disciplinary record for several reasons. A disciplinary record may reveal similar bad behavior by the officer in past cases. Here is one example: in many drug cases, an officer will claim that the defendant dropped the narcotics he possessed on the street just as the officer was arresting him. The defendant, however, may claim that the police dropped the illegal drugs on the street, picked them up, and then used that to arrest, search, and discover more drugs on the defendant's body. This may seem far-fetched, but anecdotal research shows that these "dropsy" cases happen more often than we would like to think,[27] particularly where officers believe that a suspect possesses narcotics but lack reasonable suspicion to search him. A disciplinary record that shows numerous past complaints of illegal searches related to

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[24] *Who Shouldn't Prosecute the Police*, *supra* note 20 at 1464.

[25] Donald Dripps, *The Case for the Contingent Exclusionary Rule,* 38 Am. Crim. L. Rev. 1, 20 (2001) ("studies have consistently found that successful suppression motions are quite rare.").

[26] Floyd e.g.

[27] *See, e.g.*, Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 Fordham Urb. L.J. 315, 324 (2005) (noting that "dropsy" testimony began after the Warren Court's criminal procedure revolution and that such testimony should be, but is not, viewed with suspicion); Morgan Cloud, *The Dirty Little Secret*, 43 Emory L.J. 1311, 1318 (1994) (noting the troubling "repetition of this suspicious story in case after case that suggests fabrication" but the paucity of examples where such testimony is disbelieved).

drugs would be extremely relevant to a suppression hearing in a dropsy case. Yet defense lawyers are routinely denied access to such records, and the stated intent of the New York law is to prevent the records from being used in this way.

Those in favor of preventing defense access to disciplinary records might argue that the defense will use irrelevant, unsubstantiated allegations to jam up legitimate cases, besmirch the reputation of honest officers, and taint the factfinders' impression of the testifying officers' credibility. Police union representatives go even further, claiming that "making detailed personal information available to convicted criminals will potentially put our officers and their families at risk."[28] These arguments are unconvincing. First, a judge, either at a suppression hearing or a jury trial, is fully competent to weigh the prejudicial versus probative impact of police disciplinary records. This is the type of balancing a judge does with evidence offered to impeach the credibility of any witness. Second, the institutional biases in favor of police officers are so strong that it is hard to imagine even credible, substantiated disciplinary infractions dramatically changing the number of cases where evidence is suppressed or where a defendant is acquitted. Finally, there is no evidence or reason to suspect that making police disciplinary records available to defense attorneys will make officers and their families less safe. While police officers face difficult and dangerous situations as part of their jobs, officer safety cannot be used to defeat legitimate legal arguments in favor of criminal defendants. If, somehow, an officer's safety will be at risk based on something in his record, a judge is competent to make that determination and redact that portion of the record.

## II. Releasing Police Records to the Public

Thus, the reason behind New York's law protecting police officers' privacy is the worst defense of the law. Some have used this to argue that the law should be repealed entirely.[29] This, I believe, is a mistake. While police officers are public servants, which makes transparency central to their accountability, that principle must be weighed against the equally important principle of individual privacy.

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[28] Brenda J. Lyons, *State Committee Urges Cuomo, Legislators to Open Police Files* TimesUnion, (Dec. 19, 2014), http://www.timesunion.com/local/article/Report-says-police-files-should-be-open-to-public-5967527.php#page-1.

[29] *See, e.g.,* Daniel Denver, New York's police secrecy law: de Blasio fights to keep NYPD abuse records from the public, Salon (June 29, 2016) (noting that "the Committee on Open Government, an independent state agency, called for the legislature to make repealing or reforming 50-a a priority.").

While this should hold little sway when the accountability is to a criminal defendant facing the loss of liberty, we should be much more careful when the call is to expose disciplinary records to the public. Take the case of Officer Pantaleo. There is much to the argument that he should have been indicted by a Staten Island jury, but he was not. Yet he *is* currently under investigation by a federal grand jury. While this investigation is ongoing, the publicity of his record might well taint the jury's consideration of the charges against him, the same way publicity of facts against any defendant might impact a jury considering her fate. The frustrations of community members who see police act with impunity is wholly justified, but publicly shaming a criminal suspect who may be indicted by a grand jury is a short-term strategy that does little to rectify the problematic culture which leads to police brutality.[30]

More globally, we should be asking ourselves what implications flow from the argument that all police disciplinary records should be made public. As discussed above, some of the allegations against an officer will likely be false, or at least unsubstantiated. The public does not have the mandate or the institutional competence that a judge or lawyer might have when considering different levels of complaint-substantiation. Perhaps even more importantly, the knowledge that records will be made public will affect how complaints are dealt with by those charged with investigating officers. The CCRB or the internal investigators in a police department may decline to vigorously investigate charges against an officer if they believe that whatever they discover will be laid bare. Police departments are already notoriously hesitant to fire bad officers,[31] and will be even less likely to do so if incentives exist for an officer's misconduct to go unrecorded. This holds not just for officers who commit violent arrests or brutalize citizens, but also for those officers who show their unfitness in other ways – racism or sexism toward other officers, alcohol or drug related problems on the job, allegations of dishonest overtime reports, and countless other ways in which an officer might show himself unfit to serve the public long before he does something outwardly violent to a citizen. We need to strengthen the internal control over police officers and, while transparency may help to force police departments to fire the worst officers, it may also retard their efforts to collect information on their employees, cause them to circle wagons even more tightly, and give them another reason to refuse to engage with the community.

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[30] *Cf. Police Suspects, supra* note 6 (arguing that rather than strip police of specialized interrogation rights, we think about how extending those rights to all suspects might aid in criminal justice reform).

[31] *See, e.g.,* Mike Riggs, *Why Firing A Bad Cop is Damn Near Impossible*, REASON (Oct. 19, 2012).

Moreover, all government employees benefit from privacy protections that stop their records from becoming public.[32] While it is certainly possible to argue that the police serve a unique function in our society that makes their record-transparency particularly important, it is not far-fetched to assume that transparency-related arguments could be made in favor of publicizing the records of public school teachers, public university employees, firefighters, doctors and nurses who work at publicly funded hospitals, and a whole host of other employees. At some early point in the debate over the publication of officer records, we must consider how such arguments affect other government and government-funded employees.

## Part III. Police Records as Criminal Records

There are also criminal justice-related legal and policy concerns lurking just downstream from the question of police privacy matters. The privacy versus transparency debate impacts another, far less institutionally powerful group of individuals whose lives are constantly affected by the specter of public-outing: formerly incarcerated individuals. Whether, how, and for how long to publicize the criminal records of those who have served their sentences and are attempting to reintegrate into society are questions that scholars and politicians are addressing in several forms.[33] Recent academic literature, with notable exceptions,[34] tends to come down squarely on the side of more privacy for these individuals.[35]

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[32] There are far too many privacy-related statutes to mention here but two examples should serve. New York Civil Rights Law section 50, protects not just police records, but also the records of firefighters, paramedics, and probation officers. Additionally, federal employees' records are protected by federal statute. Under 5 C.F.R. Part 293.311, other than basic identifying information, a federal employee's information is not released to any party without a summons, warrant, or subpoena.

[33] *See, e.g.*, Michelle Natividad Rodriguez & Beth Avery, *Ban the Box*: *U.S. Cities, Counties, and States Adopt Fair Hiring Policies,* Nat'l Employment Law Project (Apr. 1, 2017), http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide (describing various reforms implemented to protect formerly incarcerated peoples' records).

[34] James Jacobs, *Is Employment Discrimination Against Ex-Offenders Immoral*, The Volokh Conspiracy (Feb. 2, 2015) (arguing employers should have access to criminal records because "more information is always preferable to less information.") https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/02/is-employment-discrimination-against-ex-offenders-immoral.

[35] *See, e.g.*, Benjamin Levin, *Criminal Employment Law* (forthcoming Cardozo L. Rev.) (impact of criminal record on hiring decisions), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944840; Eisha Jain, *Prosecuting Collateral Consequences*, 104 Geo. L.J. 1197, 1198 (2016) (considering prosecutors' role in collateral consequences of criminal record).

Formerly incarcerated private citizens are haunted by their criminal records for decades after they complete their sentences.[36] Criminal records are used to deny them food stamps, housing, and voting rights.[37] But more importantly for purposes of this essay, they are made available to employers, educational institutions, and professional organizations.[38] The argument for publicizing these records is that the public has a right to know if someone has been convicted of a crime and to make a decision about that person's employability, institutional competency, and dangerousness based on those records. Critics of publicizing criminal records argue that they often provide little accurate information about a person but are almost insurmountable obstacles to achieving full reintegration into society. They become a perpetual punishment in the form of lack of access to civil society long after a person's punishment is meant to be over.

The arguments in favor of making officer disciplinary records public are undeniably similar to those for criminal records. As a police officer, one gives up her right to privacy because the public has a right to know whether or not she is fit to be an officer. While there are major differences to be sure between police disciplinary records and criminal records, further inquiry may find that the arguments in favor of transparency and privacy are equally compelling and equally overstated for each.[39]

## Conclusion

The purpose of this essay was twofold: to address the backward nature of New York's police record privacy law, and to begin to raise questions about how police disciplinary records should be handled more broadly. How we protect or expose the behavior of police reveals much about our commitment to privacy and transparency not only for police, but for other government employees, and for all those affected or involved in the vast and record-thick criminal justice system.

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[36] Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1790 (2012) (collateral consequences for "tens of millions" with criminal records).
[37] *Id.* at 1799-1803.
[38] Levin, *supra* note 35, at *passim* (employment, though critical to reintegration, is made very difficult for those with criminal records).
[39] This is the subject of a future project. Here I merely suggest that inquiry *could* lead to important similarities.